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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

SEA-HIRE SERVICE, S.A.,

*Petitioner,*

—against—

TRINIDAD CORPORATION,

*Respondent.*

## PETITION OF SEA-HIRE SERVICE, S.A. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. May the category of persons permitted to enforce maritime liens under the General Maritime Law or the United States Maritime Lien Act, 46 U.S.C. § 971 *et seq.*, be enlarged judicially to include an agent of a bareboat chartered shipowner charged with full responsibility to manage, operate and conduct the business of the vessel, procure and pay for the crew, fuel, stores, local port agents, maintenance and repairs, and to pay all other costs and expenses incident to the management, operation and conduct of the business of the vessel, wherever the vessel may go pursuant to a continuing term agreement providing for monthly fixed payments and periodic invoicing, or would such enlargement be contrary to this Court's decisions in *The YANKEE BLADE*, 60 U.S. (19 How.) 82, 89 (1857) and *Piedmont & G.C. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920) that maritime liens are *stricti juris* and are not to be extended by construction, analogy or inference.

2. Assuming an affirmative answer to question number 1, does the vessel manager have the right to arrest and force the judicial sale of that vessel by *in rem* proceedings under Title 46 U.S.C. § 971 *et seq.* or the General Maritime Law, where:

   (a) On the date of the arrest the payments made to the vessel manager by his principal, the bareboat chartered owner, substantially exceeded the outlays made by the manager to third-party suppliers and materialmen, but the manager had made commitments to such third-parties to pay them in the future; and

   (b) The vessel management and operation agreement required the vessel manager to disclose its agency status and the identity of its principal in all its dealings?

3. Assuming affirmative answers to questions numbers 1 and 2, where the bareboat charter contained a prohibition of lien clause, and the existence of the charter was known to, and a copy thereof in the possession of the vessel manager, but the manager had not read the charterparty, was the manager precluded from enforcing a maritime lien against the vessel, either

   (a) Because his lien was not one arising under the United States Maritime Lien Act, 46 U.S.C. § 971 *et seq.*, and this Court's decisions in *The Kate*, 164 U.S. 458 (1896) and *The Valencia*, 165 U.S. 264 (1897) control; or

   (b) Because although his lien did arise under the Act, he was charged as a matter of law with sufficient knowledge of the prohibition of lien clause to overcome the presumption of the bareboat chartered owner's authority to bind the vessel provided for in Title 46 U.S.C. 972?

## PARTIES TO THE PROCEEDING NOT LISTED IN CAPTION

MOTOR VESSEL "BEAUFORT MARINER", her engines, tackle, machinery, etc.

Platanus Shipping Line, S.A., Claimant

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## PETITION OF SEA-HIRE SERVICE, S.A. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS—SECOND CIRCUIT

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### DECISIONS BELOW

The decision of the United States Court of Appeals, Second Circuit, entered January 20, 1984, denying petitioner's petition for rehearing and suggestion of rehearing *en banc* is unreported and is reprinted here at Appendix "A". The order and decision of the United States Court of Appeals for the Second Circuit affirming the orders of the United States District Court for the Eastern District of New York appealed from entered December 2, 1983 is also unreported and is reprinted here as Appendix "B". The orders of the United States District Court, Eastern District of New York denying petitioner's motion to dismiss the complaint, directing that the vessel be sold at an interlocutory sale and denying petitioner's motion to be relieved of the order of interlocutory sale made on July 8, 1983, July 13, 1983 and July 18, 1983, respectively, are also unreported and are reprinted here as Appendices "C", "D" and "E", respectively.

### JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

### STATUTES INVOLVED

***46 U.S.C. Section 971. Persons entitled to lien.***

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in*

*rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.

***46 U.S.C. Section 972. Persons authorized to procure repairs, supplies, and necessaries.***

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

***46 U.S.C. Section 973. Notice to person furnishing repairs, supplies, and necessaries.***

The officers and agents of a vessel specified in §972 of this Title shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel.

***46 U.S.C. Section 974. Waiver of right to lien.***

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

## STATEMENT OF THE CASE

This petition seeks review of an affirmance by the United States Court of Appeals—Second Circuit of an order of sale of the tank vessel BEAUFORT MARINER entered in the United States District Court for the Eastern District of New York on July 13, 1983 in an admiralty *in rem* suit instituted by respondent, and of an order of July 18, 1983 by the same district court denying a motion to vacate that order.

The basis of the appeal was the non-existence of a maritime lien on the vessel in favor of respondent for three reasons:

(1) Respondent's status as the vessel's manager and general agent;

(2) The fact that respondent had not furnished the services or materials forming the basis of the alleged lien, nor paid for them when it caused the vessel to be arrested;

(3) The existence of a prohibition of lien clause in the bareboat charterparty from the actual shipowner to petitioner, precluding petitioner from creating liens upon the vessel, that was known to respondent well before the arrest of the vessel by respondent on June 28, 1983.

On July 8, 1983, the district court had upheld the existence of a maritime lien in favor of respondent against a challenge based upon respondent's general agency status.[5-8a] Respondent's broad responsibilities to, general authority from, and continuity of relationship with its principal, petitioner, under its management and operation agreement with petitioner was such that this decision went beyond any previously decided case.

Then, on July 13, 1983, the district court directed the vessel to be sold at marshal's auction eight days later. [9-13a] On July 18, 1983, it denied petitioner's further motion to be relieved of the sale order and for dismissal of the complaint grounded upon the prohibition of lien clause in the bareboat charter and respondent's not having expended the monies claimed as the subject of its lien until after the arrest. [21a] After a request

for a stay pending appeal was denied, the sale went forward on July 22, 1983. The high bid was $620,000 against an actual value of more than twice that. The sale of the vessel was confirmed on July 26, 1983, with no one other than respondent asserting a claim against the vessel.

This distress cash sale totally destroyed petitioner's interest in the vessel, because it still owed more than $620,000 toward the purchase price of the vessel.

The undisputed facts were as follows:

On March 2, 1983, petitioner entered into a hire-purchase bareboat charter agreement with Platanus Shipping Line, S.A., ("Platanus") the registered owner of the BEAUFORT MARINER, by which petitioner agreed to purchase the vessel for a price of $1,040,000 to be paid in installments of hire, with petitioner occupying the position of bareboat charterer until the full price was paid.

As part of the transaction, on March 2, 1983, petitioner, respondent and Ilford Shipping and Trading Corporation Ltd. ("Ilford"), an earlier bareboat charterer of the BEAUFORT MARINER from its prior owner, agreed by an assignment and assumption agreement [30-33a] that petitioner would assume the obligations of Ilford under a vessel management and operation agreement between respondent and Ilford of September 26, 1979, [24-29a]. Simultaneously, respondent released Ilford and agreed to perform its duties under the management agreement for petitioner instead of Ilford [30-33a].

The hire-purchase bareboat charterparty between petitioner and Platanus of March 2, 1983 contained a prohibition of lien clause reading:

> "10. *Right to create liens against the Vessel*
>
> Neither the Charterer nor the Master of the Vessel nor any other person except the Owner shall have any right, power or authority to create, incur or permit to exist upon the Vessel any lien whatsoever other than liens for Master and crew's wages and salvage. The Owner however may create Mortgage(s) of the Vessel and the Charterer agrees to

place any notice of any such Mortgage(s) aboard the Vessel in the manner provided by any such Mortgage(s)." [23a]

The hire-purchase bareboat charterparty was at all material times on board the vessel and a copy was in the possession of Trinidad [17a].

Clauses 1 and 2 of the management and operation agreement provided:

1. *Appointment of Manager.*

Owner hereby appoints Manager as its Agent for the management, operation and conduct of the business of the Vessel. Manager agrees to act as such Agent and to manage, operate and conduct the business of the Vessel to the satisfaction of the Owner and in an efficient and economical manner, and to exercise due diligence to protect and safeguard the interest of Owner in all respects. All of Manager's acts hereunder in connection with the Vessel shall be done as agent for and on behalf of Owner as bareboat charterer and operator of the Vessel.

Manager shall not represent itself or hold itself out as owner or charterer of the Vessel, but shall always disclose its agency and the name of Ilford Shipping and Trading Corporation Limited [1] as bareboat charterer of the Vessel.

2. *Operation.*

Manager agrees on behalf of Owner to man, equip, victual and supply the Vessel and to pay for all provisions, wages, fuel, port expense, pilotage, agencies, consular charges, cabin deck, engine-room, and other stores, and all other costs and expenses incident to the management, operation and conduct of the business of the Vessel. [24-25a].

---

1 Should be read as Sea-Hire Service, S.A. (petitioner) after March 2, 1983 [30-33a].

Respondent agreed to maintain contracts with seamen's union or manning agents [25a] to formulate, pursue and collect insurance claims, to maintain and repair the vessel [25a], to perform all customary agency duties concerned with loading and discharging cargoes reserving to itself "the privilege of using agents for the transaction of customary agency business" [26a], and to maintain and render full accounting of monies due, received and expended on a monthly basis if required. The agreement called for New York Arbitration, with Pennsylvania Law to apply [29a]. The only meaningful function not delegated to respondent was the chartering of the vessel and the collection of freights which were reserved to petitioner. The agreement could be terminated by either party upon 60 days' written notice, amended in part to 10 days in the assumption and assignment agreement. Payment by petitioner was to be on a monthly basis of one-twelfth of the estimated $1,320,000 annual cost of respondent's performance, plus reimbursement of certain outlays within 10 business days of receipt of respondent's invoice therefore. [32a]

Respondent acted as the vessel's manager and operator for petitioner from March 2, 1983 [30a] until the day of the arrest, June 28, 1983. During this period respondent continuously and without interruption represented the vessel while voyages were performed from Korea to Indonesia to Singapore to Indonesia to the Caribbean, and several Caribbean voyages were then performed, followed by the final one to the United States.

According to respondent's records, as of June 28, 1983, the date of the arrest, respondent had expended $534,977.64 on behalf of petitioner pursuant to the vessel management and operation agreement and had received from or credited petitioner with $653,405.06 meaning that respondent's expenses and disbursements were less than its outlays by $118,427.42 (respondent admitted in its brief that a $130,000 payment from petitioner was received by respondent's bank on the day of the arrest, but claimed such receipt to have been after the close of respondent's business day).

Respondent's records also indicated that after the arrest, while the vessel was in *custodia legis* and under circumstances

suggesting that respondent felt it could safely disregard its agency defense against various suppliers (see management and operation agreement, Par. 1 requiring respondent to advise all third-parties of its agency status and disclose the identity of its principal [24a]), respondent made payments totalling $320,649.25, including a $159,251.00 bank transfer to a sub-agent Consulmar, Bilbao, Spain, for payroll and benefit expenses from April 1983, through September, 1983, which notations in handwriting indicate was deferred by respondent on several occasions until after the vessel was arrested; $6,064.67 was paid to a travel agent in Philadelphia on June 30, 1983 for various plane tickets including at least two flights taking place after the arrest; $1,011.62 was paid on June 30, 1983 by respondent to itself for various items including interest after the arrest; $35,000 was advanced to the master after the ship was under arrest, on June 30, 1983; and then $47,432.38 was paid to Consulmar on July 7, 1983, for wages through July 8, 1983, including at least 11 days of post-arrest wages; and $68,838.16 was paid on July 7, 1983 to Texaco International Trader Inc., for fuel.

Petitioner moved to vacate the arrest by order to show cause on July 5, 1983. The ground of this motion was the respondent was a general agent and thus not entitled to a maritime lien. A hearing was held in the district court on July 7, 1983.

On July 8, 1983, the district court read into the record a decision [5-8a] denying the motion to vacate the arrest, and holding that respondent was a special, rather than general agent. This decision reveals that the district court considered it a condition precedent for a general agency to exist that the agent procure freights and retain a certain percentage thereof as his fee [8a] and was of the view that respondent had only "limited functions" [8a], whereas it had to have "virtually complete control and dominion" over the vessel to qualify as a general agent [8a].

The district court did recognize that if respondent was a general agent it was not entitled to a maritime lien [119A], referring to *The SALZACHTAL*, 373 F.Supp. 267 (E.D.N.Y. 1974). It stated that prior to March 2, 1983 respondent had had

no contact with petitioner and therefore could not possibly have relied upon petitioner's credit [8a], evidently assuming there to be a distinction between the meaning and effect of the management and operation agreement as between Ilford and respondent, and the same agreement as between petitioner and respondent, and that a prior relationship is a *sine qua non* to the extension of credit.

On July 12, 1983, respondent moved pursuant to notice returnable the same day, for an order directing the interlocutory sale of the vessel. The affidavit in support of this motion claimed that the costs of maintaining the vessel under arrest were excessive and disproportionate and requested the right of respondent to bid up to the amount of its lien without making any cash payment. This motion was heard on July 12, 1983, and was continued to July 13, 1983 at which time the district court directed an interlocutory sale to take place on July 22, 1983 as requested by respondent [9-13a].

On Thursday, July 14, 1983, counsel for respondent first obtained a copy of the Platanus-petitioner hire-purchase bareboat charterparty of March 2, 1983, and immediately moved by order to show cause to be relieved from the order of interlocutory sale and for dismissal of the complaint by reason of the presence of the prohibition of lien clause in that charterparty.

On July 18, 1983 this motion was heard. A supplemental affidavit was submitted to the court at that time setting up the circumstances with respect to the prohibition of lien clause, the existence of a credit in favor of petitioner in terms of cash expenditures as of the time of the arrest of the vessel, and attaching voluminous exhibits in support of petitioner's arguments with respect to the prohibition of lien clause and the failure of respondent to have either paid for or rendered services which import a maritime lien as of the time of the arrest.

The district court denied the motion from the bench. [21a]

The transcript of the July 18, 1983 hearing [14-23a] reveals that the district court accepted the testimony of respondent's

vice president that although he received a copy, he had not read the bareboat charter containing the prohibition of lien clause, as justifying a finding that respondent did not have actual knowledge thereof. [20a] This witness also confirmed that there was a $118,000 credit in favor of petitioner on the books of respondent at or one day after the day of the arrest. [19a]

Thereafter, the district court declined to fix the amount of security required and denied a request for a stay of the interlocutory sale stating:

> THE COURT: "Definitely will not give you a stay.
>
> Before you, it was Mr. Zinke. It has been day to day or day after day to day—whatever it has been.
>
> We have come here and you have spoken to them or Mr. Zinke has spoken to Mr. Bowles and you have had discussions and you should know what the amount is. You know what they are looking for. I cannot tell them do something else and I am not going to change."
>
> MR TROWBRIDGE: With all respect, what if you are wrong? How can we undo the sale after it is reversed on appeal?
>
> THE COURT: It's only money. You know what I mean.
>
> If I am wrong, I am sure they good for a little more. You will get a little more out of them."[21-22a]

Petitioner noticed an appeal to the United States Court of Appeals for the Second Circuit and moved that Court for a stay of the sale pending appeal and for an expedited appeal. The motion was heard by telephone conference on July 21, 1983 at which time that Court indicated that a stay for two weeks, but not pending the appeal which would take longer because no panels were sitting until August 7, 1983, would be granted if petitioner could post $60,000 cash that same day to cover the current expenses of the vessel while a release bond was obtained. The motion was withdrawn when it became evident that petitioner could not meet this deadline.

After the sale, the Second Circuit affirmed the district court's action in a short form, one page decision [4a] in which

it was concluded that the district court's findings on two irrelevant propositions of fact, never contested by petitioner, were not "clearly erroneous". Such was the basis for upholding the district court's findings that respondent was a special rather than general agent and that the prohibition of lien clause was not operative. The Second Circuit rejected the contention that respondent did not have a mature maritime lien at the time of the arrest by stating such contention to be "similarly without merit" [4a]

## BASIS OF JURISDICTION IN THE DISTRICT COURT

The Federal Jurisdiction of the United States District Court for the Eastern District of New York was based upon the admiralty and maritime jurisdiction of that Court under Article III, Section 2 of the Constitution of the United States and Title 28 U.S.C. Section 1333.

## REASONS FOR GRANTING THE WRIT

**A. The effect of the decision of the courts below is to extend the availability of the harsh remedy of the maritime lien in favor of a ship's agent beyond that permitted by any previously decided case in contravention of this Court's directives that the maritime lien is stricti juris, and inconflict with decisions in other circuits.**

Ever since our courts embarked upon the case by case development and definition of the extent of the *in rem* jurisdiction to enforce maritime liens conferred upon the judicial branch of the United States Government by Article III, Section 2 of our Constitution, there has been a consistent, uninterrupted thread of decisions denying lien status to those persons whose relationship with the owner of the vessel sought to be made the subject of a lien was one of continuity, closeness and involved the exercise of discretion in the representation of that owner.

Thus, a proctor in admiralty obtains no lien on a vessel for professional services in her defense. *The EUROPIETRO*

*CAMPANELLA*, 81 F.Supp. 475, 485 (D.C.D. Md. 1948); nor does a time charterer who pays and victuals the crew pursuant to contractual agreement with the owner. *The FORT GAINES*, 24 F.2d 438 (D.C.D. Md. 1928). Stockholders and part owners are not entitled to claim maritime liens for necessaries or supplies they provide. *The PRESIDENT ARTHUR*, 25 F.2d 999 (S.D.N.Y. 1928); *THE FRANK BRAINERD*, 3 F.2d 664 (D.Me. 1925); *The KONGO*, 155 F.2d 492 (6th Cir. 1946), *cert. denied*, 329 U.S. 735 (1946). Even the master of a vessel was given no lien for unpaid wages; *The GRAND TURK*, 1 Paine 73 (C.C.N.Y. 1817); *Ex Parte Clarke*, (D. Mass. 1843) Fed. Cas. No. 2, 796; until the rule was abrogated by statute 46 U.S.C.A. §606 (1968). The direct supplier of voyage necessities to the vessel was, before enactment of the United States Maritime Lien Act in 1910, denied a lien if those necessaries were provided to the vessel at its home port, *The GENERAL SMITH*, 17 U.S. (4 Wheat.) 438 (1819); *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1875).

So too a wharf owner who made his entire pier available to the shipowner on a continuous basis for a daily fee under an agreement terminable on notice was denied a lien. *The ADVANCE*, 60 F. 766, (S.D.N.Y. 1894), *aff'd*, 71 Fed. 987 (2d Cir., 1896).

Prominent in this lineup of judicial authority are those decisions which deny to the general agent who represents a vessel and its owner on a continuous basis rather than a one-shot, single transaction basis, and who exercises discretion and judgment in the course of that representation, the right to exercise a maritime lien upon the vessel to recover monies due him for advances or charges under the agency agreement. *China Mutual Insurance Co.* v. *Ward*, 59 Fed. 712 (2nd Cir. 1894); *The CENTAURUS*, 291 Fed. 751 (4th Cir. 1923); *The MARET*, 145 F.2d 431, 443 (3rd Cir. 1944); *The AMERICAN STAR*, 11 F.2d 479, 482 (3rd Cir. 1926); *The HOXIE*, 297 Fed. 189 (4th Cir. 1924); *The RALEIGH*, 32 Fed. 633 (S.D.N.Y. 1887), and many others.

The *ratio decidendi* of all these cases is the extent of the relationship and familiarity with which the agent has with the

owner of the ship, viz., he is doing things for the shipowner on a continuous basis independently of the whereabouts of the vessel at any given time which the shipowner, were he in position, might well be doing for himself. It is such that the lien claimant is identified with the owner whom he knows, and is too far removed from the classic situation of the one-shot, single occasion supplier in an outport who has a need to look to credit of the vessel, and does so, to be permitted to exercise this drastic remedy.

The state of the law denying a general agent for a steamship company a maritime lien against the vessel has not been altered by the *United States Maritime Lien Act*, 46 U.S.C.A. 971 *et seq.*; *The CENTAURUS*, *supra*; *The MARET*, *supra*, at p. 443; *The PRESIDENT ARTHUR*, 279 U.S. 564, 568 (1929).

Another proposition of the law of maritime liens of at least equal vintage and vitality today is the rule that such liens, being secret and indelible, with the potential of adversely affecting general creditors and bona fide purchasers without notice, are *stricti juris* and are not to be extended by construction, analogy or inference. *The YANKEE BLADE*, 60 U.S. (19 How.) 82, 89 (1857); *Piedmont & G.C. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 12, (also holding that the Maritime Lien Act does not broaden the scope of the maritime lien) (1920); *The LUCIE SCHULTE*, 343 F.2d 897 (2d Cir. 1965); see also *Nadle v. M/V TEQUILA*, 1973 A.M.C. 909, 913 (S.D.N.Y. 1973).

The affirmance of the district court holding that respondent was a special agent and therefore entitled to a maritime lien, has sanctioned a radical departure from, and does serious violence upon, both of these bedrock principles of the law of maritime liens. A general agent acting over a continuous term contract in exchange for monthly payments with almost every discretionary power which a shipowner itself would have over the affairs of the ship, has been permitted to obtain a maritime lien against the vessel it is charged with protecting and managing.

Both courts have grossly misconceived the criteria for distinction between general and special agents in producing this result. Those criteria are spelled out in a long line of cases.

One of the leading authorities dealing with the factual elements requisite to a determination that a given lien claimant is or is not a general agent, is the opinion of Judge Chesnut in *Todd Shipyards Corporation* v. *The City of Athens*, 83 F.Supp. 67 (D.C. Md. 1949). That case involved claims of three foreign agents of a passenger ship. The one who most closely approached a general agent was named Gastaldi. He was employed by the owner to act as agent for the vessel at Genoa, Naples and Brindisi, Italy at which ports the vessel called seven times. He did the customary services that an agent in an outport performs, paying harbor dues, arranging pilotage, lighterage, stevedoring provisions, taxis, etc., etc., and would collect outgoing freight and passage money. The court upheld the lien of Gastaldi pointing out that he had no general control over the ship's movements or any authority to speak or act for her other than in relation to the necessary services for the particular ports he serviced. There was no written contract. He was a port agent. His accounts with the principal were kept separately for the ship for each voyage. There was no general running account between Gastaldi and the owner. Judge Chesnut cited the *Restatement of Agency* as follows:

> "A general agent is an agent authorized to conduct a series of transactions (involving a *continuity of service* (italics supplied). A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service" (83 F.Supp. at p. 88).

Here respondent did have a running account with petitioner. Respondent represented the BEAUFORT MARINER wherever it went and hired sub-agents at the different ports. There was a clear continuity of service between respondent and the BEAUFORT MARINER commencing in September, 1979, and continuing through the date of the arrest.

The special agent, who has a lien, is engaged on a one-shot basis or a series of one-shot bases. In *Compagnia Maritima La Empresa, S.A.* v. *Pickard*, 320 F.2d 829 (5th Cir. 1963) Judge John R. Brown, in upholding a maritime lien against a claim of general agency, stated the matter thus:

> "The thing which characterizes a general agent as known in the maritime fraternity is a mutual interdependence on the financial credit and stability of each of the parties, agent and owner. The arrangement by its very nature contemplates that the agent must do many things in advance of the arrival or after departure of the vessel. Reimbursement of his expenditures and the payment of his fees, whether by commissions on freight or otherwise, is not dependent upon the profitableness of that immediate venture." (p. 832).

Judge Brown's opinion described the lien services there upheld as a "single shot affair" (p. 832).

In the instant case, respondent was to be paid pursuant to written agreement negotiated with petitioner in equal monthly installments payable in advance on the first day of each month in amount equal to one-twelfth of the total annual estimated operating costs and expenses of respondent, and petitioner was to remit the cost of vessel bunkers, port expenses, canal tolls, port agency fees and expenses and major repairs "within ten business days following the receipt of an invoice therefore" from respondent [31-32a]. This is clearly reliance upon the credit of petitioner wholly independent of the vessel's availability to be made the subject of a maritime lien in this or that port. Is is the exact antithesis of a one-shot arrangement. Respondent was the manager and operator of the BEAUFORT MARINER wherever that vessel went, in port or out of port, at sea or anchor, with the duty "to man, equip, victual and supply the vessel and to pay for all provisions, wages, fuel, port expenses, pilotage, agencies, consular charges, cabin, deck, engine room and other stores, and all other costs and expenses incident to the management, operation, and conduct of the business of the vessel." [25a]

In *Ameejee Valleejee v. Victoria V.*, 661 F.2d 310 (4th Cir. 1981) a Pakistani port agent which had serviced the owner's vessels only in Karachi, and which did not on its own authority pay crews, accept non-routine cargo, or exercise any control outside the port of Karachi, and who reported to the owner's

general agent, was held to be a special agent. The court, after stating that the degree of authority exercised by the agent was a more important factor than continuity of service, noted that the lien claimant had dealt with the owner's general agent at arm's length.

However, the fact is clear that the agent, Amjee, did not have continuity of service. It only functioned in Karachi.

Here, respondent had both continuity of service and broad discretion. Respondent reported to no general agent between it and petitioner; it engaged agents like Amjee; it represented the vessel wherever it went, paid the crews, etc., etc., at all times without geographical or time frame limitation.

The district court predicated its finding that respondent was a special agent upon another critical misapprehension that "[a] general agent, by contrast to a special agent, is one to whom virtually complete control and dominion is entrusted" [8a]. Not so. It is not necessary for a party to exercise complete control over a vessel in order to be labelled a general agent. It is sufficient if he exercises extensive control on an ongoing basis and looks to the credit of the owner (in this instance the hire-purchase bareboat charterer), not the vessel.

In *The RALEIGH*, 32 Fed. 633, *supra*, the libellants Mudgett & Co. claimed a maritime lien for advances and supplies furnished by them to the vessel *RALEIGH* which was the sole property of a Boston corporation. As agents for the vessel in New York, Mudgett & Co. obtained charters, collected freights, paid bills, and procured insurance:

> ". . . all, however, subject to the direction and control of Captain Littlefield, who was the general superintendent of the [vessel-owning] corporation and master of the ship, who signed all charters, and occasionally collected some of the freights due." *Id.* at 634.

The Court held that Mudgett & Co. were general agents and not entitled to a maritime lien despite the fact that they did not possess exclusive control of the ship.

Here, as in *The RALEIGH*, although respondent did not possess exclusive control over the vessel, its duties with respect

to operating the vessel were abundantly extensive enough to render it a general agent. The vessel management and operation agreement [24-29a] itself is the best evidence of such a relationship, and the utter absence of reference in that carefully drawn, detailed agreement to any maritime lien in favor of respondent confirms the view of the contracting parties that respondent would not look to the credit of, and go around arresting the vessel it was charged with protecting and managing.

In *The CENTAURUS*, 291 Fed. 751, *supra*, an agent claimed a maritime lien for expenditures and advances made for supplies, provisions and other necessaries furnished to the ship.

The Fourth Circuit in this 1923 decision affirmed a lower court decision denying the validity of the petitioner's lien on the ground that the petitioner was a general agent. The court stressed the extent of the agent's discretion and the absence of separate accounts on a ship by ship, voyage by voyage basis.

Nor is it essential to be a general agent that the lien claimant have authority to book cargoes and fix charter parties.

In *Savas* v. *Maria Trading Corporation*, 285 F.2d 236 (4th Cir. 1960), a marine engineer was held to be a special agent for services he performed on a ship in Norfolk and in Baltimore but was held to be a general agent for services he performed in Bremen. The court held that while the plaintiff had acted as an independent contractor in this country, in Germany he was acting as the owner's representative. *Id.* at 339.

Thus, the scope, continuity, payment terms and discretion characterizing Trinidad's relationship with Sea-Hire have all the earmarks of a general agency in every traditional sense.

In this case the Second Circuit decision in affirming the district court stated:

> "Judge Bramwell found that Trinidad believed that its relationship to Sea-Hire would be limited to a single voyage from Inchon, Korea to Mexico. This finding is not clearly erroneous. We conclude with Judge Bramwell that Trinidad was not relying on the credit-worthiness of Sea-Hire for this transitory commercial encounter." **[4a]**

Whatever petitioner subjectively thought at the outset was not contested. It is wholly irrelevant to a determination of respondent's status in relation to petitioner as of the time respondent purported to exercise a maritime lien on the BEAUFORT MARINER. The operative considerations are what did happen. Was there a continuity of relationship and was respondent, on the undisputed facts, cloaked with sufficient discretionary authority on an overall basis in terms of the actual transactions that took place, so as to be classified as a matter of law as a general agent not entitled to maritime lien? The Second Circuit never mentioned these critical factors.

It can not be disputed that respondent represented the vessel in the broadest respects on voyages from Korea to Indonesia to Singapore to Indonesia, then half-way across the world to the Caribbean, for several Caribbean voyages and then a further voyage to the United States, and was paid $659,151.57 for doing this by respondent. There are no factual issues in respect of these actual facts and occurrences.

A general agent does not become a special agent because he might have subjectively regarded his likely role as "transitory" at the outset, whatever "transitory" may be intended to mean. In holding otherwise the Second Circuit completely sidestepped the legal issue presented to it.

The Second Circuit cited *P.T. Perusahan Pelayaran Samudera Trikora Lloyd* v. *T.S. SALZACHTAL*, 373 F.Supp. 267, 277-78 (E.D.N.Y. 1974) as legal precedent supporting its novel "transitory" approach. That case is not on point. The language on pp. 277-78 of *SALZACHTAL*, to which the Second Circuit presumably alluded in its opinion is as follows:

> ". . .[W]e conclude that the Confidential Agreement replaced what was essentially a charter-at-will with an agency relationship in which Trikora operated the vessel under Nelson's direction *for a single-shot voyage, any continuation of the arrangement requiring an additional agreement*. . . .
>
> We find here that Trikora was *not authorized* to conduct a series of transactions involving continuity of ser-

vice and accordingly was not a general agent." (Emphasis added)

The crucial difference between the court's finding in *SALZACHTAL* and the present case is that, in *SALZACHTAL*, the agent's *authority* to operate the vessel was limited to a single voyage; further agreements were needed for it to continue to operate the vessel, and it was *not* authorized to conduct a series of transactions.

Here, respondent under the explicit terms of the vessel management and operation agreement was authorized and in fact obligated to operate and manage the vessel on a continuing basis terminable by either party only on 10 days notice, and did so for four months. There were no geographical, time or voyage limits provided for in the vessel management and operation agreement. Whatever respondent may have "assumed" or "believed" the length of its relationship with Sea-Hire was to be had no bearing on the contractual obligation it entered into with petitioner.

The Second Circuit's preoccupation with the erroneous and inapplicable finding that the relationship between petitioner and respondent was intended to be "transitory", is hard to understand. No prior decision has permitted an agent whose activities would otherwise characterize him as a general agent to attain lien status by ascertaining an intent on his part at the outset, not realized as things developed, to be a "transitory" operative. The allowance of a lien on this basis undermines the entire body of maritime law which denies a lien to a general agent, conflicts with the other circuit court decisions cited above and violates the rule against extending such liens by inference, construction or analogy enunciated by this Court. It should not stand.

The fact that the Second Circuit elected to express its decision in a non-published informal opinion should not, we submit, deprive petitioner of review in this Court simply because news of the unjust forfeiture permitted by the courts below has not been circulated to a wide audience.

**B. The decisions of the courts below ignored the established proposition of the Federal Law of Maritime Liens, under the United States Maritime Lien Act and otherwise, that a maritime lien is extinguished by payment and cannot arise in favor of a person who does not himself provide necessaries to a vessel unless and until that person becomes subrogated to the rights of third parties who do provide necessaries by paying them.**

It is not disputed that when the sun went down in New York Harbor on June 28, 1983, the day of the arrest, in terms of cash receipts and disbursements, respondent owed petitioner some $118,000 [19a]. As aforesaid, with the ship under arrest and petitioner's June 28, 1983, $130,000 payment in hand, respondent went about paying itself and others in respect of some alleged "commitments" respondent had made prior to the arrest and also in respect of considerable post-arrest items.

It has long been a fundamental proposition of the law of maritime liens that a special agent who does not himself directly furnish the supplies or materials to the vessel, but has engaged third-parties to do so, does not as such have a maritime lien. To protect the special agent in such instances admiralty long ago developed the doctrine that if certain strict conditions were met, the agent making an advance to a third-party lienor would be subrogated to the lien of that third-party. The decision most frequently cited to this proposition is *The City of Camden*, 147 F. 847 (S.D. Ala. 1906). The Second Circuit adopted the rule in *The Ruth E. Merrill*, 286 Fed. 355 (2d Cir. 1922).

In order to be subrogated to the maritime lien of a third-party, it must be shown that it was necessary to advance the funds. *The Ana R. Heidritter*, (D. Mass. 1923) 289 Fed. 112 (lien claimant must show the necessity for the repairs, supplies or advances and their actual use and benefit received by the vessel in order to have a lien, p. 114); *The Maud Palmer*, (D. Mass. 1915) 224 Fed. 655; *The Alcalde*, (W.D. Wash. 1904), 132 Fed. 576.

In *The Englewood*, 57 F. 2d 319 (E.D.N.Y. 1932), the court stated that in order for the advances of a ship agent to pay seaman's wages to be afforded a lien status by subrogation it was incumbent upon the claimant to show the individual seaman paid and the amounts paid to each.

*Blacks Law Dictionary*, Fourth Ed., 1951, defines "subrogation" as follows:

> "A legal fiction through which a person who, not as a volunteer or in his own wrong, and in absence of outstanding and superior equities, pays debt of another, is substituted to all rights and remedies of the other, and the debt is treated in equity as still existing for his benefit . . . the principle which lies at the bottom of the doctrine is the person seeking it *must have paid the debt* under grave necessity to save himself a loss. The right is never accorded to a volunteer." (emphasis added)

Respondent contended it was entitled to lien status because as of the time of the arrest respondent was "committed" to make such payments. If it did make such "commitments" respondent was in violation of Par. 1 of the vessel management and operation agreement providing:

> "Manager shall not represent itself or hold itself out as owner or charterer of the Vessel, but shall always disclose its agency and the name of Ilford Shipping and Trading Corporation Limited [petitioner now], as bareboat charterer of the Vessel." [24a]

Had it lived up to this undertaking respondent would have had an agency defense and would not have been under any "commitments" to third parties.

Thus, respondent at the time of the arrest was not entitled to be subrogated to the lien rights of anyone it later paid because at that time it had paid no money. It made the later payments, either as a volunteer or, if obligated, the "committments" it had entered were in breach of the above quoted condition of the management and operation agreement.

It follows that respondent as of the time it arrested the vessel did not enjoy a maritime lien by virtue of whatever "commitments" it had made to pay certain suppliers *in futuro*, enjoyed a substantial over-payment from petitioner and was not within its rights in instituting the *in rem* proceedings when it did, whatever its status.

The district court was of the erroneous view that respondent was a lien act claimant [8a]. Section 971 of the United States Lien Act, (46 U.S.C.A. §971 *et. seq.*) provides for "Any person *furnishing* repair, supplies, towage, use of drydock or marine railways, or other necessaries" to have a lien (emphasis added). The only theory upon which respondent could have a lien under the statute is by way of subrogation which, as discussed above, cannot be operative on the uncontested facts of this case.

Moreover, § 974 of the Act since its original enactment in 1910 and as re-enacted in 1920 has at all times provided:

> "This chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances. . ."

As this Court pointed out in *Piedmont & G. C. Co.* v. *Seaboard Fisheries Co.*, 254 F. U.S. 1, 12, *supra*, the Act produces no changes in the law of maritime liens which are to remain *stricti juris*, and are not to be extended by construction analogy or inference. The Second Circuit's decision did not set forth its reason for affirmance on this point, the effect of which was to expand the lien for advances so as to confer a lien upon persons who had not made advances, but might be doing so in the future, a new and unprecedented enlargement of this remedy.

**C. The courts below have denied effect to a charter-party prohibition of lien clause in contravention of the prior decisions of this Court, or, alternatively, assuming respondent to be a Lien Act claimant, in violation of that Act by interpreting the presumption of authority of petitioner to bind the vessel set forth in § 972 to be operative even though respondent was charged with actual knowledge of the absence of such authority.**

Clause 10 of the hire purchase bareboat charter party [23a] contained the prohibition of lien clause quoted *supra*. Clause 11 required that a signed copy of that agreement be kept onboard the vessel and exhibited to persons having business with the vessel which might give rise to a maritime lien.

Respondent's executive vice president testified on July 18, 1983, that a copy of the bareboat charter had been received by respondent on or about June 7, 1983 [17a] which had been picked up on shipboard earlier by another representative of respondent [17a]. He also testified that he did not read the charter party. The district court ruled from the bench that respondent did not have knowledge of, and was not to be charged with, the prohibition of lien clause [20a]. The Second Circuit treated this as an issue of fact and affirmed the ruling as not clearly erroneous [4a].

This, we submit, was egregious error.

The prohibition of a lien clause was as a matter of law, effective to prevent a maritime lien (whether statutory or non-statutory) from arising in favor of respondent whether or not the clause was actually read.

As to non-statutory liens, such as those for breach of charter parties, the Second Circuit in *United States* v. *S.S. LUCIE SCHULTE*, 343 F. 2d 897 (1965), denied a charter party lien by reason of the existence of a prohibition of lien clause. The court in that case followed the line of cases decided by this Court beginning with *The Schooner Freeman* v. *Buckingham*, 59 U.S. 190 (1855) and continuing with *The Kate*, 164 U.S. 458 (1896) and *The Valencia*, 165 U.S. 264 (1897), which denied liens where the material man could readily have ascertained the

vessel was chartered and the charterer had agreed to pay the expense in question.

The leading case prior to the 1971 amendment of the United States Lien Act (discussed below), *United States* v. *Carver*, 260 U.S. 482 (1923), was additionally relied upon. The Second Circuit in the *LUCIE SCHULTE*, *supra*, stated:

> "We see no adequate reason for not reaching the same result in a case where the shipper could have ascertained the facts by exercise of reasonable diligence—a rule which, without statutory directive, The Kate and The Valencia had applied to the equally worthy materialman. . . . We are dealing in this case with a shipper in large volume and of extraordinary sophistication." (p. 901).

This court also stated:

> "It follows that if the United States had known that the LUCIE SCHULTE was under charter and *had seen the charter parties*, it would have no lien." (p. 901) (Emphasis added)

Certainly respondent is an experienced and sophisticated organization, it had "seen" the charter party, its contractual undertaking in the management and operation agreement was to enable petitioner to perform that charter party [24a], and any lien that it might lay claim to on the basis of the general maritime law must be regarded as eliminated by the prohibition of lien clause because due diligence by respondent surely would have disclosed that clause.

Even if respondent was a special agent, and was retroactively subrogated to the maritime liens of *statutory* lien claimants by payments it made after the arrest, it was still precluded by the prohibition of lien clause.

In 1971 Congress amended § 972 of the Lien Act (46 U.S.C.A. 972) to provide that the managing owner, ship's husband, master, or, any person to whom the management of the vessel at the port of supply is entrusted is "presumed" to have authority from the owner to procure repairs, supplies,

towage, etc., etc. This presumption replaced the earlier language of Section 972 providing:

> "Nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence, could have ascertained, that because of the terms of a charter party agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Gilmore & Black, in their treatise, *The Law of Admiralty*, 2d Ed. 1975, at p. 686, discuss the effect of this amendment as follows:

> It will no doubt be argued by counsel for materialmen that only 'actual knowledge' (as distinguished from 'notice') of lack of authority will defeat the lien. History suggests that the argument will not be persuasive. In any field of law in which the acquisition of rights is conditioned on the absence of knowledge of certain facts, the judicial criterion for determining when the fatal knowledge exists is, as the matter is usually put, objective and not subjective. That is, A will not be heard to plead personal or subjective ignorance of whatever the crucial fact may be if it appears that he knows other facts from which any reasonable man would deduce the existence of the crucial fact."

In *T.T.T. Stevedores* v. *Jagat Vijeta*, 509 F. Supp 1072 (E.D. Tex., 1981) aff'd in part, rev'd in part 696 F. 2d 1135 (5th Cir. 1983)[2] a stevedore was held to have had actual knowledge of a prohibition of lien clause in a charter agreement, the court stating:"

---

2 The Fifth Circuit reversed the district court's factual finding of actual knowledge because it held that the lower court had improperly imputed the knowledge of TTT Agencies, an agent of the stevedore to the stevedore. The Circuit Court held that when TTT Agencies received the charter party, it was acting as an agent for the shipowner, not the stevedore.

> "T.T.T. Stevedores also knew the provision of the charter, including the no lien clause, as it had received a copy of the charter agreement from Dempo."(p. 1079).

In *Lake U. Drydock Co.* v. *M/V Polar Viking,* the court held that "[t]he legislative history indicates that the assertion of a lien will be barred if the materialman has knowledge of a non-lien charter clause." 446 F. Supp. 1286, 1290 (W.D. Wash. 1978).

Similarly, in *Ramsay Scarlett & Co.* v. *S.S. KOH EUN,* the court held that "[a]ny prohibition of lien clause is thus ineffective against such a supplier of necessaries absent *actual knowledge of a charter including a prohibition of lien clause.*" (emphasis added) 462 F. Supp. 277, 285 (E.D. Va. 1978).

Respondent is a sophisticated and experienced ship operator and agent. It knew of its principal's bareboat charter from the outset. In determining whether a party has actual notice of a fact, courts have consistently allowed proof of such notice by either direct or circumstantial evidence; *Simmons Creek Coal Company* v. *Doran,* 142 U.S. 417 (1892); *National Labor Relations Board* v. *Vapor Recovery Systems Company,* 311 F.2d 782, 786 (9th Cir. 1962).

The subjective finding of fact that the clause was not read by respondent is thus extraneous. As a matter of law respondent had sufficient knowledge of the existence of the prohibition of lien clause in the charter party between petitioner and the actual owner to overcome the statutory presumption. That presumption was obviously designed to protect strangers, not ship managers.

Once the existence of actual knowledge is established, it is impossible for a charterer such as petitioner to create a maritime lien against a vessel owned by another that has been precluded from arising by virtue of a prohibition of lien clause. At that point the charterer is legally incompetent to create a lien or to bind the vessel, and the Second Circuit's view to the contrary, i.e., that petitioner had a duty to call the clause to respondent's attention, failing which petitioner would somehow gain authority to bind the vessel, is way off the mark.

There have been many district and circuit court decisions struggling with the extent to which the 1971 amendment to the United States Maritime Lien Act, 46 U.S.C. §971 *et seq.*, has wrought changes in the law as laid down by this Court as regards the effect of charterparty prohibition of lien clauses. Granting the instant petition may well provide vessel owners, charterers and materialmen badly needed guidance in this critical area and at the same time, we are confident, correct a serious and substantial injustice to an individual litigant which has truly not had fair treatment.

## CONCLUSION

IN THIS CASE THE COURTS BELOW, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT, AND IN CONTRAVENTION OF THE UNITED STATES MARITIME LIEN ACT, HAVE EXPANDED THE AVAILABILITY OF THE ALREADY HARSH REMEDY OF THE MARITIME LIEN TO PERMIT A GENERAL AGENT NOT ENTITLED TO A LIEN BECAUSE OF ITS STATUS AS SUCH, WHICH HAS BEEN PAID FOR ALL NECESSARIES TO THE VESSEL IT HAS PROVIDED OR PAID FOR, TO ARREST AND FORCE THE JUDICIAL SALE OF THE VESSEL OF ITS PRINCIPAL IN ADMIRALTY *IN REM* PROCEEDINGS. THIS HAS HAPPENED NOTWITHSTANDING THAT SUCH PRINCIPAL IS LEGALLY PRECLUDED BY A PROHIBITION OF LIEN CLAUSE IN THE BAREBOAT CHARTER FROM BINDING THE VESSEL AND THAT PRECLUSION IS KNOWN TO THE AGENT.

THE RESULT HAS BEEN A GRIEVOUS MISCARRIAGE OF JUSTICE WHICH CANNOT BE PERMITTED TO STAND, AND THE PROBABLE JURISDICTION OF THIS COURT SHOULD BE NOTED.

Respectfully submitted,
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*Of Counsel*

# APPENDICES

## APPENDIX A

**Decision of the United States Court of Appeals for the Second Circuit dated January 20, 1984**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 83-7610

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of January one thousand nine hundred and eighty-four.

TRINIDAD CORPORATION,

*Plaintiff-Appellee,*

—v.—

SEA-HIRE SERVICES, S. A. and THE MOTOR VESSEL BEAUFORT MARINER, etc.,

*Defendants-Appellants.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Sea-Hire Services, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

FRANCIS X. GINDHART
by Francis X. Gindhart,
Chief Deputy Clerk

## APPENDIX B

**Decision of the United States Court of Appeals for the Second Circuit dated December 2, 1983**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 83-7610

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of December, one thousand nine hundred and eighty-three

Present:

Honorable Ralph K. Winter,
Honorable George C. Pratt,
*Circuit Judges.*
Honorable Charles M. Metzner,
*District Judge.*

TRINIDAD CORPORATION,

*Plaintiff-Appellee,*

—v.—

SEA-HIKE SERVICE, S.A. and the Motor Vessel "BEAUFORT MARINER," her engines, tackle, machinery, etc.,

*Defendants-Appellants.*

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* N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

---

Judge Bramwell found that Trinidad believed that its relationship to Sea-Hire would be limited to a single voyage from Inchon, Korea to Mexico. This finding is not clearly erroneous. We conclude with Judge Bramwell that Trinidad was not relying upon the creditworthiness of Sea-Hire for this transitory commercial encounter. Although Trinidad's authority over the operations of the vessel was extensive, it was not so pervasive as to constitute Trinidad a general agent in light of the transitory nature of the relationship. *See P.T. Perusahaan Pelayaran Samudera Trikora Lloyd v. T.S. Salzachtal*, 373 F.Supp. 267, 277-78 (E.D.N.Y. 1974).

Judge Bramwell also found that Trinidad did not have actual knowledge of the prohibition of lien clause and that Sea-Hire made no attempt to call Trinidad's attention to it on any of the numerous occasions on which it was relevant. That finding is also not clearly erroneous and the clause is not a bar to a lien in Trinidad's favor. *See Lake Union Drydock v. M/V Polar Viking*, 446 F.Supp. 1286, 1291 (W.D. Wash. 1978).

We have reviewed appellant's other contention and find it similarly without merit. We therefore affirm.

Honorable Ralph K. Winter

HONORABLE RALPH K. WINTER

Honorable George C. Pratt

HONORABLE GEORGE C. PRATT

Honorable Charles M. Metzner

HONORABLE CHARLES M. METZNER

## APPENDIX C

**Decision from Bench of Henry Bramwell, J. dated July 8, 1983**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 C 2779

TRINIDAD CORP.,

*Plaintiff*

—versus—

SEA-HIRE SERVICE S.A. & ANO.,

*Defendant*

United States Courthouse
Brooklyn, New York
July 8, 1983
4:00 O'clock P.M.

Before:

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: Defendant Sea Hire Services, the bareboat charterer of the vessel BEAUFORT MARINER, has moved to vacate the arrest of the vessel pursuant to Eastern District Admiralty Rule of Civil Procedure 13, and Federal Rule 12 (b)

(6). Plaintiff Trinidad had the vessel arrested on June 28, here in New York Harbor.

The arrest is based upon what plaintiff contends is a valid maritime lien under 46 U.S.C. #971, created when defendant Sea hire defaulted in the payment of approximately $285,000 consisting of various management fees and outlays owed to plaintiff.

The record reveals that by agreement dated July 26, 1979, Trinidad contracted with Sea-Hire's predecessor, Ilford Shipping, to perform certain services in connection with the operation of the Beaufort Mariner. By assignment dated March 2, 1983, Sea-Hire was substituted for Ilford. The terms of the original management agreement were not otherwise changed.

Under the terms of the July 26, 1979 agreement, each party was given specifically delineated responsibilities. Under paragraph 1, Trinidad was specifically forbidden from holding itself out as the owner or charterer of the vessel. Under paragraph 3 Sea Hire was given the right to supersede crew contracts made by Trinidad. Under paragraph 4, Sea Hire was made responsible for procurement of insurance. Under paragraph 5, Trinidad was required to obtain prior approval before undertaking repairs in excessof $25,000. Under paragraphs 7 & 8, it was Sea Hire's responsibility to bill and collect for freights and charters. Under the terms of the agreement, defendant was to advance plaintiff 1/12 of the estimated annual operating costs on the first of each month.

Prior to the March 2 assignment Sea Hire had no prior dealings with Trinidad. On that date, Sea Hire advised Trinidad that the vessel, then in South Korea, was to proceed to Mexico where it would begin a bareboat sub-charter. At that point, Sea Hire advised Trinidad that their relationship was to terminate pursuant to the terms of the 1979 agreement. Thereafter, the plans changed upon Sea Hire's obtaining a contract for transport of oil from Indonesia to St. Croix. On May 17, after the vessel stopped at several intermediate ports and requests for payment of fees and reimbursement for service outlays had been made, Trinidad had the vessel arrested pursuant to an in rem attachment, in the U S. District Court for

the Virgin Islands. After Sea-Hire made its account current with Trinidad, Trinidad had the vessel released. On June 8, after Sea Hire defaulted in making another monthly payment, Trinidad had the vessel arrested again this time pursuant to process issued by the Admiralty Court of Trinidad. After making additional arrangements satisfactory to it, plaintiff once again released the vessel.

Thereafter, Trinidad continued to incur additional unreimbursed expense. By the end of June, plaintiff contends that it was owed some $285,000 by Sea Hire and continued to incur additional expense. As a result, when the vessel reached N.Y. harbor, the instant action was commenced and the boat was once again arrested. The boat is currently under arrest there, and plaintiff states that it continues to incur expense at the rate of $3000 per day, representing seamans' wages for the crew on board.

The central inquiry today, is whether Trinidad acted in the capacity of a special or general agent. The former is entitled to a maritime lien, the latter is not. Although section 971 does not specifically emply this language, cases construing it have universally recognized the significance of this distinction. Perhaps the distinction is best set out by Judge Bartels of this Court, in a 1974 case, reported at 373 F. Supp 267. I quote from page 276:

> "There is a distinction between a general and a special agent. A special agent is limited both in his scope of authority and his relationship to the owner. As a rule, this function is to supply services or other necessaries to the vessel or to make advances to one who has supplied such necessities. He does not rely upon the credit or stability of the owner but instead on the credit of the vessel. Accordingly, he is entitled to a lien."

Viewing the facts of this case against the standard, the Court is convinced that Trinidad acted in but one capacity here—that of a special agent. It is clear that the responsibiltiies entrusted to plaintiff were strictly limited under the 1979 agreement. The paragraphs of that agreement which I just alluded to do not

contemplate the broad and all encompassing authority most commonly associated with a general agent. A general agent, by contrast to a special agent, is one to whom virtually complete control and dominion is entrusted. Unlike the case of a special agent, it is he and not the owner who procures freight and charter contracts and operates them as he sees fit retaining a certain percentage of the profits as his fee. Here it was Sea Hire who procured the contracts and directed the manner in which each voyage was to proceed. Also significant here, is the fact that prior to March 2, 1983, Trinidad had no contact with Sea Hire and thus could not possibly have been relying on their credit worthiness. Significantly, paragraph 4 of the March 2 assignment provided for Sea-Hire to indemnify and hold harmless the vessel from all claims of Trinidad made upon it. Indeed, this assignment clearly bespeaks reliance by Trinidad not on the credit of Sea Hire, but on the credit of the vessel itself.

In view of all of the foregoing, therefore it is quite clear that the relationship contemplated here limited Trinidad to performance of only limited functions. Moreover, Trinidad cannot be said to have looked at any point to the credit of Sea Hire—a principal of whom it knew virtually nothing at the time the relationship commenced.

Accordingly, the Court finds this afternoon that because Trinidad has a valid maritime lien under Section 971, the arrest is in all respects proper. Therefore, the motion is DENIED.

## APPENDIX D

**Order of the United States District Court, Eastern District of New York for interlocutory sale dated July 13, 1983**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 Civ. 2779

Judge Bramwell

TRINIDAD CORPORATION,

*Plaintiff,*

—against—

SEA-HIRE SERVICE, S.A., and the Motor Vessel, BEAUFORT MARINER, her engines, tackle, machinery, etc.,

*Defendant.*

ORDER FOR INTERLOCUTORY SALE

BRAMWELL, J.:

This matter having come on for hearings on July 7 and July 13, 1983, on the motion of TRINIDAD CORPORATION, plaintiff herein, for an order directing the sale of the M/V BEAUFORT MARINER; and the Court having read the moving papers and affidavits submitted in support thereof, and the motion having been argued and submitted to the Court, and the Court being fully advised herein;

And it appearing to the Court that the M/V BEAUFORT MARINER was arrested on June 28, 1983, and taken into custody by the U.S. Marshal, pursuant to process duly issued in this matter; that the defendant has not secured the release of the arrested property, and does not intend to do so; and that such property remains in the custody of the U.S. Marshal;

And it further appearing to the Court that the property is perishable in nature, that the expenses of keeping the vessel are, or will be excessive and disproportionate to the value thereof, and that there has been an unreasonable delay in securing the release of the property; further, the BEAUFORT MARINER is a non gas-free tanker, and requires a crew on board and a supply of bunkers to maintain her inert gas system in operation to prevent the ship from becoming explosive and to comply with U.S. law; now, therefore, it is hereby

ORDERED that the United States Marshal for the Eastern District of New York be, and hereby is, authorized and directed to sell the M/V BEAUFORT MARINER and to make all necessary preparations and arrangements in the furtherance of such sale which is to take place in the lobby of the U.S. District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on the 22d day of July, 1983 at 1:00 p.m., at public auction for cash to the highest bidder upon the following terms:

(a) A cashier's or certified check expressed in U.S. currency and drawn on a New York City bank, or cash, deposit of ten percent (10%) of the bid shall be paid at the time of sale and the remaining ninety percent (90%) shall be paid by cashier's or certified check expressed in U.S. currency and drawn on a New York City bank, or cash within forty eight (48) hours after the completion of the auction. If full payment is not made in conformity with the above terms within forty-eight hours after the completion of the auction the deposit shall be forfeited by the bidder. If the sale should not be confirmed, the United States Marshal shall return all monies to the highest bidder immediately after rejection of the bid by the Court.

(b) The high bidder must, in addition to the requirements of paragraph (a) above, deposit with the Court in cash, or certified check drawn on a U.S. bank in New York City or bond satisfactory to the Court in the amount of $25,000.00 as security for its obligations, immediately upon confirmation of sale, to man the vessel, supply it with bunkers and maintain its

inert gas system in operation. The deposit required hereunder will be returned to the high bidder upon proof of satisfactory compliance with this provision, which would include reimbursing Trinidad Corporation for its expenses of maintaining the vessel, its crew, and bunkers at and during any period between the confirmation of sale and the time the owner takes over the vessel and releases Trinidad Corporation from its present obligations. If Trinidad Corporation is the high bidder, this paragraph is inapplicable to it.

(c) The sale shall be subject to confirmation or rejection by this Court on the 26th day of July, 1983 at 1:00 p.m.; and it is further

ORDERED that notice of sale, in the form attached hereto as Exhibit A, shall be published at the instance of plaintiff, Trinidad Corporation, for at least six days in The New York Times, and Journal of Commerce provided that if any of these publications do not appear frequently enough to meet the six day requirement, the requirement is waived as to such publication. It is understood that plaintiff, Trinidad Corporation, has engaged the services of a ship broker, Jacq. Pierot Jr. & Sons Inc. of New York City to arrange the above-mentioned publication and take other reasonable steps to publish widely the Notice of Marshal's Sale. And it is further

ORDERED that all expenses of maintenance, including without limitation, crew costs, bunkers, advertisements, broker's fees, and fees for port risk and other insurance procured by plaintiff, Trinidad Corporation, to cover the vessel during the period of arrest to the date the sale is confirmed, and any other expenses necessarily incurred by the Marshal for the safekeeping and preservation of the M/V BEAUFORT MARINER shall be deemed administrative expenses, and together with the Marshal's commission and expenses, shall be deducted from the proceeds of the auction sale with the balance remaining to be deposited in the Registry of this Court to stand in place of the M/V BEAUFORT MARINER pending

further disposition of this action, all without prejudice to the rights of any claimants to present the claims against the proceeds of the auction sale for determination by this Court.

Dated: Brooklyn, New York
July 13th, 1983

/s/ HENRY BRAMWELL
U.S.D.J.

NOTICE OF MARSHAL'S SALE

The tank vessel BEAUFORT MARINER, Panamanian Flag, ON 11635 PEXT-1, length 754 feet 7 inches, beam 104.2 feet, depth 53.9 feet, summer deadweight 58,380 tons, gross tonnage 30,982, net tonnage 23,345, steam turbine powered, 19,250 horsepower, built IHI Japan, 1965, equipped with inert gas system and segregated ballast tanks. Last drydocked January 1982 in Tampa, due for special survey September 1984 with year of grace. Now at anchor at Bay Ridge Flats, off Brooklyn, New York Harbor, in operating condition, with partial crew abroad, and with inert gas system energized.

ALL PARTICULARS BELIEVED TO BE CORRECT
BUT NOT GUARANTEED, WILL BE SOLD
"AS IS, WHERE IS"

FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES at public auction to be held in the lobby of the U.S. District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York on the 22d day of July, 1983 at 1:00 p.m. by the United States Marshal for the Eastern District of New York pursuant to the order of this Honorable Court dated July 13th, 1983. The sale will be to the highest bidder, subject to confirmation by the Court. Ten percent (10%) of the purchase price shall be deposited with the U.S. Marshal at the time of bid, in U.S. currency, or by cashier's or certified check expressed in U.S. currency, and drawn on a New York City bank.

Payment of the balance of the purchase price shall be paid to the U.S. Marshal in the same fashion on or before the forty-eighth hour following completion of said auction.

IN THE EVENT OF A SUCCESSFUL BIDDER'S FAILURE TO TIMELY CONSUMATE THE PURCHASE, THE TEN PERCENT DEPOSIT WILL BE FOREFEITED.

The high bidder *must, in addition* to the requirements above regarding the purchase price, deposit with the Court in cash, or a certified check drawn at a New York City bank or bond satisfactory to the Court in the amount of $25,000.00 as security for its obligation, to immediately upon the confirmation of the sale, to man the vessel and to supply it with bunkers and maintain the BEAUFORT MARINER's inert gas system in operation. This deposit will be returned to the buyer upon proof of satisfactory compliance with this provision, which would include reimbursing Trinidad Corporation for its expenses to maintain the vessel, its crew and bunkers, etc., during any period between the confirmation of sale and the time the new owner takes over the vessel and releases Trinidad Corporation from its present obligations. If Trinidad Corporation is the high bidder, this paragraph is inapplicable to it.

The vessel may be inspected by appointment by calling Mr. William B. Mollard, Jacq. Pierot Jr. & Sons Inc., ship brokers, 29 Broadway, New York, New York 10006, Telephone 212-344-3840.

## APPENDIX E

### Excerpt from Transcript of July 18, 1983 hearing

[3] * * *

MR. TROWBRIDGE: May I approach, your Honor?

THE COURT: Yes.

MR. TROWBRIDGE: I am Charles Trowbridge, a member of the firm of Walker & Corsa.

I have been out of town but I'd like to argue the motion on behalf of the defendants, if I may.

THE COURT: Surely.

MR. TROWBRIDGE: After the Court's ruling last week and the Friday before, two facts came to our attention which we submit require dismissal of the complaint as a matter of law.

Those two facts are these: The Bare Boat charter party referred to in the complaint and which has at all relevant times been in existence between our client, Sea-Hire and the actual owners of the ship, Platanus, contains a prohibition of lien claus in Clause 10 which was been quoted in the motion papers and the law is quite clear if anyone seeking to impose a lien on a vessel has knowledge of such clause he has no lien. That is the first fact.

The second fact we learned is that as of the date this ship was arrested, on June 28th, if we refer to [4] the documents provided by the plaintiff after the ruling on the validity of the maritime lien—this is Exhibit 2 to this rather fat affidavit I burdened the Court with—we can see, on June 28th, the day the ship was arrested, there was in fact a balance owning, according to Trinidad's own documents, of only about $11,000, a $20,000 item less a $9,000 item.

The funds—in other words, the first day this ship is under arrest, Trinidad's own records show that it received $130,000 from our client.

Now, at that point, one day after the arrest of this ship, while it is in the custody of the Court, under Trinidad's own numbers in terms of expenditures, it has a balance in favor of the defendant of $118,000.

Thereafter, while the ship is under the custody of the Court some $320,000, listed on the bottom of the second page of Exhibit 2, to my affidavit, were paid.

Now your Honor, it is absolutely basic that you cannot get a maritime lien if you don't either perform services or expend money. They did neither.

As of the time this ship was arrested and as of the time this complaint is verified, there was either—depending on how you construe the duties—$11,000 owed to Trinidad or $118,000 in favor of our client.

So, we say two things: We say that Trinidad had **[5]** to have notice of the prohibition of lien clause—

THE COURT: You assume notice?

MR. TROWBRIDGE: I assume this. We have known facts—

THE COURT: You don't have to argue with me at this point on that position because it is either proved or disproved. You can go ahead with your proof. But you don't have to argue to me. You can go ahead and prove it to me now. You can hold your argument and save it for later.

MR. TROWBRIDGE: Surely.

I will say this—because I think I have to do something now because of the imminence of the sale—

THE COURT: You can put witnesses on right now and prove what you say.

MR. TROWBRIDGE: As my proof I offer the following: This is the affidavit put into the Court today from Mr. Irvin, Vice President of the plaintiff.

If you look at the second page of that affidavit you will see in Paragraph V he says the Trinidad obtained a copy of this Bare Boat Charter on or about June 7, 1983 in Trinidad. That means he had it.

Now, he says here he didn't read it. I say as a matter of law, your Honor, if you have a copy of the document in the course of business you are charged [6] with having read it.

THE COURT: Where is this that you say it appears?

MR. TROWBRIDGE: The second page of the affidavit handed up today by my adversaries, of Mr. John Ervin.

(Pause.)

THE COURT: I have it.

MR. TROWBRIDGE: The second page toward the bottom, paragraph B.

THE COURT: Would it be nice if you would put some people on here and—

MR. TROWBRIDGE: I will call Mr.—

THE COURT: I don't care who you call but wouldn't it be nice if they would testify to the situation and I can hear it instead of your going back and forth and trying to prove and disprove what the papers show?

MR. TROWBRIDGE: If that is your preference.

THE COURT: It is not my preference.

I am not telling you how to handle your hearing. You can stand there and argue and then I may have to take credibility.

MR. TROWBRIDGE: I will add to my initial proof that there was notice of the prohibition of lien clause by calling Mr. Jack Ervin to the witness stand, if I may.

THE COURT: You can call him if you want to, sure.

[7] MR. TROWBRIDGE: Would you please take the witness stand, Mr. Ervin.

THE COURT: Don't feel I am requiring you to do anything. You understand?

If you are calling him it is because you want him. Don't feel I am requiring you to do anything. It is just a matter of whether or not you want to make a record. That is your problem.

**[8]** JOHN J. ERVIN, called as a witness, having been duly sworn by the Clerk of the Court took the witness stand and testified as follows:

*Direct Examination by Mr. Trowbridge:*

Q Mr. Ervin, you are Executive Vice President of the plaintiff in this case?

A Yes, I am.

Q You have been familiar with the arrangements between the plaintiffs and defendant Sea-Hire Service since the inception?

A Yes.

Q And you have filed affidavits in this case; two so far?

A Yes.

Q And in the affidavit that was sworn to on July 18, 1983, today, which I will put before you, on the second page you state in substance, do you not, that the bare boat charter party between the owner of the Beauford Mariner and the defendant in this case or one of them, Sea-Hire, S/A was received by Trinidad on or about June 7, 1983?

A That's correct.

Q How did you come to have that document?

A The copy of the bare boat charter was obtained by one of our representatives attending the vessel Trinidad in **[9]** June and he returned a copy to this office. He was given a copy by the Master.

Q That copy or another copy had been on shipboard?

A Yes.

Q And the name of that gentleman?

A Carlo Palmieri.

Q Now, did you have any discussion—

MR. TROWBRIDGE: Strike that.

Q Did you read the charter party in question?

A No.

Q Did you know at the time you received the charter party that Sea-Hire Service was a bare boat charter rather than the actual owner?

A Yes.

* * *

[12] • • •

Q Now, during the course of—how long a period of time—for how long a period did your company perform services for Sea-Hire from the beginning When did it first start?

A March 3rd until the vessel was arrested.

Q This year?

A 1983.

Q During that period of time several of your employees went onboard the ship, did they not, at different ports?

A We had maybe two or three people onboard the vessel.

Q Um huh. Okay.

When you participated in the decision to lien the Beauford Mariner on this latest occasion, did you have or refer to any record as to what amounts of money your [13] company had expended at that time that had not been repaid to it?

A Yes.

Q How much?

A We had commitments for—

Q No, no—expended.

A I'd have to refer to my records.

Q Would you look at this sheet of paper, two sheets attached to my affidavit submitted and sworn to today as Exhibit 2.

I ask you and the Court to disregard the dark ink stains.

A This record was prepared after the fact—

Q But it is prepared—

A From our office.

Q By you?

A Yes.

Q Whose handwriting is that?

A One of our accountants'.

Q Do you have any reason to think it is not reliable?

A No.

Q Can you tell us what that document indicates Sea-Hire owed to Trinidad or Trinidad owed to Sea-Hire in respect of actual expenditures by Trinidad as of two dates: June 28, June 29, 1983?

[14] MR. BOWLES: You are excluding the commitments made by Trinidad?

MR. TROWBRIDGE: I am asking about out of pocket expenditures.

You can have him testify to commitment.

Out of pocket expenditures is how you get liens.

MR. BOWLES: Objection.

THE COURT: That is self-serving, so you can help ourself.

MR. TROWBRIDGE: I am trying to.

THE COURT: I know.

A There was a deficit cash position of some $20,000.

Q What happened the next day?

A There were two adjustments. There was a receipt of $130,000 in cash and there was an adjusting entry made crediting the—or charging the previous owner with some storage.

Q As of the end of June 29th, what was the position in terms of actual outlay?

A $118,000.

Q Sea-Hire had a positive cash position of $118,000?

A Yes.

Q You are aware, are you not, that June 29th was the day after the ship was arrested?

A Yes.

* * *

[19] * * *

MR. BOWLES: In the memorandum of law provided this afternoon and the second point, particularly the recent cases stress the requirement of the owner or charterer to give actual notice.

They have an affirmative duty to give such notice in advance before people prejudice themselves and get themselves into a situation such as Trinidad has, by [20] the failure of Sea-Hire or the owner to give this type of actual notice.

One case, including one cited by the Sea-Hire group, Ramsey Scarlet Inc. v. S.S. KOHEUN, cited at Page 9 of my brief, specifically noted that the fact that a party has knowledge of a bare boat charter does not bar a lien if they have no actual notice of the provisions of a prohibition of lien clause.

THE COURT: Yes.

MR. TROWBRIDGE: I have no further questions of Mr. Ervin.

If I could briefly respond to counsel's statement I would simply say that we have here a situation where an experienced and sophisticated corporate entity admits that the charter was on the ship it visited and it had a copy of this bare boat charter.

In the circumstances I suggest that it has got to be—

THE COURT: Did it have knowledge?

MR. TROWBRIDGE: I say it is charged with knowledge.

THE COURT: In this case I don't see knowledge. I don't see that at all, counsel.

* * *

**[30]** * * *

THE COURT: You see, it is unfortunate. It is unfortunate, but in circumstances such as these, you know, a creditor is not going to feel is he going to be any better off with seeing you sale across the Pacific—there goes the boat. You know what I mean?

Be realistic. Be realistic and don't feel that he is going to look out on the sea as you go across the waves. Don't feel that way.

MR. TROWBRIDGE: I don't.

THE COURT: You had best be realistic.

MR. TROWBRIDGE: I am not usually accused of being unrealistic.

THE COURT: It is unfortunate, but it is life.

**[31]** MR. TROWBRIDGE: Here is what I am asking you, your Honor—

THE COURT: You can ask me anything.

MR. TROWBRIDGE: If you disagree with our legal position and we cannot get the money up, we will satisfy the Coast Guard. We have talked with them. We will get the ship gas free and pay the money, a $100,000.

THE COURT: You better get together with them and if you can work out your money factor I don't see there will be any problem. You will get your ship, but if you don't work it out that's going to be it. I can tell you that now, because I am not going to change. I am not changing.

MR. TROWBRIDGE: When you say, "them", is it the Coast Guard or plaintiff's attorneys?

THE COURT: Sort of round them up. This is the last round up for you.

MR. TROWBRIDGE: I am asking your Honor to defer the sale—

THE COURT: I am not going to do that. I am not going to do that, absolutely not. I wouldn't do that especially if he has gone to the expense of publication. I definitely will not do that. No sir. We have gone into this too much. I might only say, your application is denied. The sale will continue as [32] originally scheduled by this Court. That is what I am telling you.

MR. TROWBRIDGE: You will not give me a stay, your Honor?

THE COURT: Definitely will not give you a stay.

Before you, it was Mr. Zinke. It has been day to day or day after day today—whatever it has been.

We have come here and you have spoken to them or Mr. Zinke has spoken to Mr. Bowles and you have had discussions and you should know what the amount is. You know what they are looking for. I cannot tell them, do something else and I am not going to change.

MR. TROWBRIDGE: With all respect, what if you are wrong? How can we undo the sale after it is reversed on appeal?

THE COURT: It's only money. You know what I mean. If I am wrong, I am sure they good for a little more. You will get a little more out of them.

MR. TROWBRIDGE: It is not your money with all respect. It is not your money nor the Government's.

* * *

[38] * * *

MR. BOWLES: One last matter.

A continuing problem has been to keep a supply of fuel on the ship so that her boilers and inert gas system can continue to operate.

As of last week the owner did arrange to put bunkers onboard but in a small token amount of something like 725 barrels and it is going to run dry and I would ask for more.

If we have to pay for it, we will do it, but it has to be done tomorrow.

MR. TROWBRIDGE: If you put off the premature sale we will not only put bunkers on the ship but take her out and clean her off.

THE COURT: That is between all of you. I will permit the sale to continue.

MR. SCHULMEISTERS: It should be an administrative expense.

[39] MR. TROWBRIDGE: It comes off the top.

MR. BOWLES: Who is going to arrange for it?

MR. TROWBRIDGE: Let's talk, as the Judge suggested.

THE COURT: You have got up to the date of sale. That is as much as I can see.

Anything else?

MR. BOWLES: No, your Honor.

THE COURT: Thank you, thank you.

## APPENDIX F

### Excerpt from Hire Purchase Bareboat Charter Agreement

10. *Right to create liens against the Vessel*

Neither the Charterer nor the Master of the Vessel nor any other person except the Owner shall have any right, power or authority to create, incur or permit to exist upon the Vessel any lien whatsoever other than liens for Master and crew's wages and salvage. The Owner however may create Mortgage(s) of the Vessel and the Charterer agrees to place any notice of any such Mortgage(s) aboard the Vessel in the manner provided by any such Mortgage(s).

## APPENDIX G

### Excerpts from the Vessel Management and Operation Agreement

*Exhibit A*

VESSEL MANAGEMENT AND OPERATION AGREEMENT

THIS IS AN AGREEMENT dated September 26, 1979 between ILFORD SHIPPING AND TRADING CORPORATION LIMITED, a Bermuda corporation with offices at Hamilton, Bermuda, Bareboat Charterer ("Owner") of the Liberian flag vessel BEAUFORT MARINER, official number 2215, ("Vessel"); and TRINIDAD CORPORATION, a Delaware corporation ("Manager") with offices at 926 Public Ledger Building, Philadelphia, Pennsylvania 19106.

1. *Appointment of Manager*

Owner hereby appoints Manager as its Agent for the management, operation and conduct of the business of the Vessel. Manager agrees to act as such Agent and to manage, operate and conduct the business of the Vessel to the satisfaction of Owner and in an efficient and economical manner, and to exercise due diligence to protect and safeguard the interest of Owner in all respects. All of Manager's acts hereunder in connection with the Vessel shall be done as agent for and on behalf of Owner as bareboat charterer and operator of the Vessel.

Manager shall not represent itself or hold itself out as owner or charterer of the Vessel, but shall always disclose its agency and the name of Ilford Shipping and Trading Corporation Limited as bareboat charterer of the Vessel.

2. *Operation*

Manager agrees on behalf of Owner to man, equip, victual and supply the Vessel and to pay for all provisions, wages, [2] fuel, port expenses, pilotage, agencies, consular charges, cabin, deck, engine-room, and other stores, and all other costs and expenses incident to the management, operation and conduct of the business of the Vessel.

3. *Manning the Vessel*

Manager agrees, on behalf of Owner, to maintain contracts with appropriate seamens' unions or manning agents for both licensed and unlicensed personnel. All crewmembers engaged for employment aboard the Vessel shall be employees of Manager. Manning of Vessel shall be maintained at all times as required by governmental authorities and classification societies having jurisdiction over the Vessel. Manager shall maintain earning and other necessary or customary records for such seamen, and prepare necessary tax returns and other reports as required by appropriate governmental authorities, unions, or pension and benefit bodies. Owner reserves the right, upon not less than thirty (30) days' written notice to Manager, to enter contracts directly with unions, individuals, or vessel manning agents for manning of the Vessel, provided, however, that contracts entered into by Owner shall not be in conflict with, or breach of, contracts previously entered into by Manager.

* * *

[4] * * *

5. *Maintenance and Repairs*

Manager shall exercise reasonable care in accordance with good commercial practice to maintain the Vessel in highest classification of the American Bureau of Shipping and any appropriate governmental agency for vessels of its type, and to keep the Vessel in a thoroughly efficient state in hull, machinery, equipment, personnel and other particulars relating to the seaworthiness of the Vessel, and to keep the Vessel working

and to prevent loss of time. Except in cases of serious emergency, no maintenance or repairs shall be made or incurred and no alterations in hull, machinery or equipment shall be made by Manager in excess of $25,000.00 without first securing the written authorization of Owner. Manager shall arrange for the repair of the Vessel in shipyards at the direction of and in accordance with specifications and procedures from time to time authorized or prescribed by Owner.

6. *Port Turnaround and Dispatch*

Manager agrees to perform all the necessary and customary duties of managing and operating the Vessel; and to perform, or cause to be performed, all the customary agency duties concerned with loading and discharging cargoes at all ports, and all things necessary for the protection and safeguarding of the interest of Owner. Manager reserves the privilege of naming port agents for the transaction of customary agency business, the reasonable fees and expenses of such agents to be for Owner's account. All expenses and disbursements referred to herein as chargeable to the Vessel and Owner are to be those which are the usual and customary expenses for a vessel of this type engaged in similar trade.

* * *

**[8]** * * *

13. *Payment of Vessel Costs by Owner to Manager*

Owner shall pay to Manager, in equal monthly installments each payable in advance on the first day of each month during the period of this Agreement, an amount equal to one-twelfth of the total annual estimated operating costs and expenses of the Manager attributable to the operation of the Vessel ("Operating Advance"). The operating costs and expenses for the Vessel as of October 1, 1979 are estimated to be $5,911,000.00 per annum. The Operating Advance shall be adjusted on a monthly basis, but only when mutually agreed by Owner and Manager and operating budgets shall be updated from time to time (but at least quarterly) to reflect the actual

operating expenses of the Vessel. Any cost or expense reimbursement to Manager by insurance or otherwise, which has been included in any of the aforesaid amounts, will be deducted from the next payment of Operating Advance required hereunder. Any reimbursement by insurance for wages or salaries of employees of Manager shall **[9]** be retained by Owner or remitted to Owner if made to Manager. If at any time Owner shall fail to pay the Operating Advance as required herein, Manager shall have the right, upon 10 days' written notice to Owner, to terminate its obligations under this Agreement; such termination to be without prejudice to any of Manager's rights arising prior to said termination.

14. *Management Fee*

In addition to the payments provided in paragraph 13 above, Owner shall pay to Manager, as full-compensation for Manager's services hereunder including the management expenses and overhead costs incurred by Manager in performing under this Agreement, a fee commencing as of September 19, 1979 of (a) $250.00 for each day the Vessel is operating, or (b) $125.00 for each day the Vessel is in lay-up. Unless otherwise agreed in writing, Manager shall be entitled to its fee as if the Vessel were operating for the first thirty (30) days subsequent to the Vessel's entering lay-up, and lay-up fees shall cease and operating fees commence upon receipt by Manager of notice from Owner to proceed to activate the Vessel. Said Management Fee shall be payable monthly in advance and shall be based upon the status of the Vessel anticipated by Owner for the month or any pro rata part thereof, and any variance in status shall be adjusted in the statement for the following month.

15. *Owner's Obligations and Reservations*

(a) Owner may during the term of this Agreement, **[10]** elect to take unto itself the management of the Vessel's Maintenance and Repair as set forth in paragraph 5 above. If such option is elected, Owner will provide written notice to Manager at least sixty (60) days prior to the effective date of such election, and

the parties will on the effective date transfer the Maintenance and Repair function. On and after the effective date of transfer of this function, the Management Fee due Manager hereunder shall be reduced by twenty-five (25) percent.

(b) Owner shall comply with all provisions of the bareboat charter with respect to the Vessel and all provisions of any ship mortgage to which the Vessel may be subject, except those provisions which are delegated hereunder to Manager.

(c) Owner reserves the right to perform, or to contract with other parties to perform, upon ten (10) days' notification to Manager, any services which Owner from time to time elects, subject however to Manager's authority in respect to the overall management and conduct of the business of the Vessel and subject to Manager's responsibility to correct (or, if beyond Manager's ability to correct, to notify Owner of) any present or potential difficulty, whether or not arising from services directly performed by Manager.

16. *Liability.*

(a) Owner agrees that Manager shall be under no liability to Owner of any kind or nature whatsoever in the event that Manager should fail, by reason of any labor shortage, dispute **[11]** or difficulty or any strike or lockout or any shortage of material or any act of God or peril of the sea or any cause beyond the control of the Manager, to obtain officers or crew for the operation of the Vessel or fail to arrange for the fitting out, refitting, maintenance or repairing of Vessel or fail to perform any other service hereunder.

(b) Owner agrees that Manager shall be under no responsibility or liability to the Owner for loss or damage to the Vessel arising out of acts or omissions of the Master, officers and crew of the Vessel and Owner agrees to indemnify and hold Manager harmless from any losses, claims or damages arising out of the management, operation or conduct of the business of the Vessel except those resulting from the negligence of Manager.

17. *Term and Termination*

(a) This Agreement and the management of the Vessel by the Manager, as provided for herein, shall be for a term of one year from October 1, 1979 through September 30, 1980 and thereafter shall continue until terminated upon sixty (60) days' written notice by either party to the other.

* * *

**[14]** * * *

(c) This Agreement, its interpretation, performance and enforcement and the rights and remedies of the parties hereunder, shall be governed and construed by and in accordance with the laws of the Commonwealth of Pennsylvania.

ILFORD SHIPPING AND TRADING CORPORATION LIMITED

By BERNARD L. STESNEY
Vice President

TRINIDAD CORPORATION

By J. A. ELMAN
President

# ASSIGNMENT AND ASSUMPTION AGREEMENT

AGREEMENT, made as of the 2nd day of March, 1983, by and among Trinidad Corporation, a Delaware corporation ("Trinidad"), Ilford Shipping and Trading Corporation Limited, a Bermuda corporation ("Ilford") and Sea-Hire Service, S.A., a Panamanian corporation ("Sea-Hire").

*WITNESSETH:*

WHEREAS, Trinidad and Ilford have entered into a certain operating agreement dated September 26, 1979 (the "Trinidad Agreement") with respect to the Vessel ARCO COLUMBIA now known as the BEAUFORT MARINER (the "Vessel"); and

WHEREAS, pursuant to an Agreement of Sale dated as of February 14, 1983 between Beaufort Mariner, Inc., the owner of the Vessel ("Owner") and Sea-Hire (the "Agreement of Sale"), Sea-Hire is to assume all obligations of Ilford under the Trinidad Agreement and hold harmless Owner and Ilford from certain matters relating to the Agreement of Sale;

NOW, THEREFORE, in consideration of the premises, the mutual covenants contained herein, and other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Ilford hereby (a) transfers to Sea-Hire all of Ilford's right, title, and interest in and to the Trinidad Agreement, and all of its obligations and liabilities with respect thereto, (b) agrees to remain liable to Trinidad for all of its obligations and liabilities under the Trinidad Agreement outstanding on or incurred prior to the date hereof, and (c) releases Trinidad from all claims or liability based upon or arising out of the operation or management of the Vessel under the Trinidad Agreement prior to the date hereof.

2. Sea-Hire hereby (a) assumes all of the obligations and liabilities of Ilford under the Trinidad Agreement from and after the date hereof, assumes all of the obligations and duties

of Ilford under the Agreement of Sale after the date hereof, and (b) agrees to be bound by and to perform the terms of the Trinidad Agreement after the date hereof.

3. Trinidad hereby (a) consents to the foregoing transfer and releases and relieves Ilford of and from any and all liability, obligation, cost or expense under the Trinidad Agreement incurred after the date hereof, any language in the Trinidad Agreement to the contrary not withstanding and (b) agrees to discharge its duties and obligations to Sea-Hire under the Trinidad Agreement with respect to the Vessel after the date hereof.

4. Sea-Hire hereby agrees to indemnify and hold harmless the Vessel, Ilford and Owner, and all their respective officers, Directors and employees, from and against all obligations, demands or payments to Trinidad arising out of or in connection with (a) the sale of the Vessel pursuant to the Agreement of Sale or (b) the Trinidad Agreement with respect to matters occurring after such sale.

5. After the date hereof, the Trinidad Agreement shall continue in full force and effect in accordance with the terms applicable on the date hereof except only as amended in the following respects.

(a) *Pararaph 4, page 3*. Sea-Hire will deliver to Trinidad copies of insurance policies, cover notes or certificates from insurance brokers for the stated minimum amounts within 30 days after the date hereof;

(b) *Paragraph 13, page 8*. Shall read in full as follows:

13. *Payment of Vessel Costs by Owner to Manager.*

Owner shall pay to Manager, in equal monthly installments each payable in advance on the first day of each month during the period of this Agreement, an amount equal to one-twelfth of the total annual estimated operating costs and expenses of the Manager attributable to the operation of the Vessel, exclusive of bunkers, port expenses, canal tolls, port

agency fees and expenses and major repairs ("Operating Advance"). Said operating costs and expenses for the Vessel as of February 28, 1983 are estimated to be $1,320,000 per annum. The Operating Advance shall be adjusted on a monthly basis, but only when mutually agreed by Owner and Manager and operating budgets shall be updated from time to time (but at least quarterly) to reflect the actual operating expenses of the Vessel. Owner shall remit the cost of Vessel bunkers, port expenses, canal tolls, port agency fees and expenses and major repairs within 10 business days following receipt of an invoice therefor from Manager. Any cost or expense reimbursement to Manager by insurance or otherwise, which has been included in any of the aforesaid amounts, will be deducted from the next payment of Operating Advance required hereunder. Any reimbursement by insurance for wages or salaries of employees of Manager shall be retained by Owner or remitted to Owner if made to manager. If at any time Owner shall fail to pay the Operating Advance or any operating cost or expense of the Vessel as required herein, Manager shall have the right, upon 10 days' written notice to Owner, to terminate its obligations under this Agreement; such termination to be without prejudice to any of Manager's rights arising prior to said termination.

(c) *Paragraph 18, page 12.* The address of Sea-Hire for all notices required or permitted to be given under the Agreement of Sale shall be:

Sea-Hire Service, S.A.
c/o International Cargo Brokerage Company
c/o Navtal Agency, Inc.
65 Broadway
New York, NY 10006
Attention: John Weaver

6. This Assignment and Assumption Agreement shall be of no force or effect unless signed in original or counterpart copies by each of the parties to be bound hereby.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be duly executed on the date first written above.

TRINIDAD CORPORATION

By J. E. ELMAN
Title Executive Vice President

ILFORD SHIPPING AND TRADING CORPORATION LIMITED

By _____
Title _____

SEA-HIRE SERVICE, S.A.

By _____
Title _____

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be duly executed on the date first written above.

TRINIDAD CORPORATION

By _____
Title _____

ILFORD SHIPPING AND TRADING CORPORATION LIMITED

By BERNARD L. STESNEY
Title Vice President

SEA-HIRE SERVICE, S.A.

By _____
Title _____